57286

35 38pp

(34)

No. 07-25

FILED
DEC 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-21

IN THE

Supreme Court of the United States

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM R. GROTH
GEOFFREY S. LOHMAN
FILLENWARTH DENNERLINE GROTH & TOWE
1213 N. Arlington Avenue, Suite 204
Indianapolis, IN 46219
(317) 353-9363

JOSEPH E. SANDLER
SANDLER REIFF & YOUNG PC
50 E Street, SE, # 300
Washington, DC 20003
(202) 479-1111

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
JESSICA RING AMUNSON
CARRIE F. APFEL
SHARMILA SOHONI
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

Additional Counsel Listed on Inside Cover

LUKE P. MCLOUGHLIN
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York NY 10022
(212) 891-1651

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. PETITIONERS HAVE STANDING. 3

II. PETITIONERS PROPERLY SOUGHT TO ENJOIN ALL ENFORCEMENT OF A BURDENSOME AND UNJUSTIFIED VOTING REGULATION 6

III. RESPONDENTS' EFFORTS TO SHOW AN ACTUAL OR POTENTIAL PROBLEM WITH VOTER-IMPERSONATION FRAUD FAIL. 10

A. The "Evidence" Cited by Respondents Amounts to Little or Nothing 10

B. Respondents Cannot Justify Burdening the Right to Vote by Citing Their Own Failure to Manage the Voter Rolls Properly 15

IV. THE PHOTO ID LAW'S BURDENS ON VOTING FAR OUTWEIGH THE IMPLAUSIBLE JUSTIFICATION OFFERED BY THE STATE 17

A. "Prevention" Is Not the Issue 17

B. Respondents' Analogies to Legitimate Registration Requirements Are Unpersuasive. 18

C. Respondents' Efforts to Minimize the Number of Affected Voters Are Both Erroneous and Irrelevant 20

TABLE OF CONTENTS - continued

D. The Evidence Confirms the Commonsense Conclusion that Those Most Affected by the Photo ID Law Tend to Be the Less Affluent. 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 4

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 8

Burdick v. Takushi, 504 U.S. 428 (1992) ..... *passim*

California Democratic Party v. Jones, 530 U.S. 567 (2000) 8

Clingman v. Beaver, 544 U.S. 581 (2005) 5

Common Cause/Georgia v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007) 22

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 4

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 5

International Union, UAW v. Brock, 477 U.S. 274 (1986) 5

Kadas v. MCI Systemhouse Corp., 255 F.3d 359 (7th Cir. 2001) 29

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 4

TABLE OF AUTHORITIES - continued

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 16

Public Citizen v. FTC, 869 F.2d 1541 (D.C. Cir. 1989) 5

In re Request for Advisory Opinion Regarding Constitutionality of, 2005 PA 71, 740 N.W.2d 444 (Mich. 2007) 22

Rosario v. Rockefeller, 410 U.S. 752 (1973) 19

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 6

Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) 12

MISCELLANEOUS

R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout*, VTP Working Paper #57, Version 2 (Oct. 2007), *available at* http://vote.caltech.edu/media/documents/wps/vtp_p57b.pdf 25, 27

Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 8, 2007), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf 23

TABLE OF AUTHORITIES - continued

Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006) 22

Comm'n on Fed. Election Reform, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005) 22

CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS (2007) 28

FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000) 28

Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 Pol. Sci. Q. 1 (2007) 28

Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1 10

Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis* (Nov. 2007) 27-28

LORRAINE MINNITE, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY (2007) 13

TABLE OF AUTHORITIES - continued

Secretary of State Cathy Cox, *The 2000 Election: A Wake-Up Call for Reform and Change* (Jan. 2001), *available at* http://sos.georgia.gov/acrobat/elections/2000_election_report.pdf 11

State of Wisconsin, Legislative Audit Bureau, VOTER REGISTRATION: AN EVALUATION, REPORT NO. 05-12 (Sept. 2005), *available at* http://www.legis.wisconsin.gov/lab/reports/05-12Full.pdf 13

REPLY BRIEF FOR PETITIONERS

Petitioners showed that the Indiana Photo ID Law imposes significant burdens on voting by a substantial number of people, while serving little or no legitimate public purpose. In their answering brief, the state respondents ("respondents") offer little more than obfuscation. First, and most flagrantly, they strive to create the appearance of a national problem with voter-impersonation fraud by citing a series of anecdotal reports that cannot withstand even minimal scrutiny. Either they have nothing to do with voter-impersonation fraud or they have been thoroughly debunked (or both). Yet we continue to see misleading references to myths like the 5,000 deceased Georgians who supposedly voted or the 300 Missourians who supposedly voted twice. The reality is that traditional methods of preventing voter impersonation at the polls — matching of signatures, backed by criminal sanctions — are working just fine in Indiana and everywhere else.

The obfuscation continues when respondents discuss the governing law. Because the Constitution bars regulations that needlessly burden voting rights, petitioners were not required to prove either that Indiana acted with discriminatory intent or that the Photo ID Law is an absolute bar to voting by some eligible citizens. Respondents wrongly claim otherwise, and do not even once acknowledge the governing test unanimously endorsed in *Burdick*, which requires courts in *every* case to weigh the "'character and magnitude'" of the burden on voting rights against the "'precise interests put forward by

the State as justifications,'" taking account of "'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see id.* at 445 (Kennedy, J., dissenting) (agreeing with the majority's "careful statement" of the governing test).

Finally, there is the question of how extensively, and how disparately, the Photo ID Law burdens voting. Here respondents offer the oft-repeated but almost certainly false claim that only 1% of Hoosiers lack the requisite identification. That figure was not sponsored by any witness. It came from a rough calculation by the District Court, which then acknowledged several reasons why the 1% figure might well be too low. Evidence from other States has consistently produced estimates five to ten times greater than the 1% figure.

As for *who* is burdened by the Photo ID Law, the evidence in the record strongly supports what common sense says — that the people who lack driver's licenses and identification in our society tend to be non-drivers who are low-income, elderly, or disabled. Respondents' newly minted argument that the real victims are relatively affluent, white, and Republican cannot be taken seriously. And while Indiana law allows the elderly and the disabled the option of voting absentee, that alternative does not eliminate the burden of being prevented from voting in person on Election Day, and there is no such comparable alternative for the thousands of low-income (but non-elderly and non-disabled) Indiana

residents who lack identification. Indeed, the options provided to the indigent are so convoluted as to be nearly worthless.

The effects of Indiana's Photo ID Law were seen last month in Indianapolis. In a low-turnout, odd-year municipal election, at least 32 voters were disenfranchised because they went to the polls without photo ID, cast a provisional ballot, and did not then provide the required identification to the county clerk's office within ten days. Marion County Election Bd. Br. 8-9. And many more voters lacking ID may simply have stayed away or left the polls without casting a provisional ballot. *Id.* at 8.

This should never have occurred. The government should not be allowed to erect obstacles to would-be voters by positing a need to solve a problem that does not exist.

I. PETITIONERS HAVE STANDING.

Respondents begin by questioning the unanimous ruling below that the Indiana Democratic Party has standing. But respondents' arguments are meritless.

First, as Judge Posner recognized, Indiana's Photo ID Law directly "injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." Pet. App. 4a. Oddly, respondents argue that petitioners have failed to identify an organizational objective the law frustrates. Resp. Br. 14. But of course the frustrated objective here is precisely the one the Seventh Circuit recognized —

"getting to the polls those . . . supporters" who otherwise might not vote as a result of the new law, so that these supporters can help elect Democratic candidates. Pet. App. 4a.[1]

Respondents also say that the "available evidence" suggests the Indiana Democratic Party benefits from the Photo ID Law, apparently referring to the flawed study they discuss later in their brief. Resp. Br. 14. But even if standing could be affected by an extra-record study of events occurring after judgment, and even if that study validly showed that the Indiana law deterred more Republicans than Democrats from voting in 2006, the Party still would have standing because it would still be true that the Photo ID Law forces it to expend additional resources to encourage its supporters who currently lack photo ID to vote. Moreover, those expenditures provide a basis for standing whether or not the Democratic Party succeeded in 2006 in overcoming the new law's effects and avoiding a disparate reduction in Democratic turnout.

---

[1] The supposed absence of a frustrated objective is the sole basis on which respondents purport to distinguish *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). As for *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), respondents claim it is distinguishable because the statute there eliminated prudential limits on standing. *See* Resp. Br. 15. But since a political party's interests obviously fall "within the zone of interests to be protected . . . by the . . . constitutional guarantee in question," *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), prudential standing limits are not implicated here, and *Havens* cannot be distinguished on that basis.

In any event, as Judge Posner further recognized, the "Democratic Party also has standing to assert the rights of its members who will be prevented from voting by the new law." Pet. App. 4a (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Respondents suggest various limitations on the *Hunt* rule authorizing associational standing, but those limitations are created out of whole cloth. The *Hunt* Court did not hold that the affected members must be identified by name. *See* Resp. Br. 16. Nor would such a requirement make sense where, as here, there was a clear showing that some substantial number of unnamed members will be affected. *See Public Citizen v. FTC*, 869 F.2d 1541, 1551-52 (D.C. Cir. 1989) (citing cases). *Hunt* also did not require that the members have the capacity to control the organization. *See* Resp. Br. 16-17. Indeed, this Court has recognized that even absent some formal system for member control, "[t]he very forces that cause individuals to band together in an association will . . . provide some guarantee that the association will work to promote their interests." *International Union, UAW v. Brock*, 477 U.S. 274, 290 (1986).

Respondents' only other argument is that plaintiffs claiming associational standing must have more formal membership admission procedures than those used here. Resp. Br. 16-18. But this Court has frequently recognized that voters may affiliate with political parties through actions other than formal induction into membership. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 590 (2005) ("In general, anyone can 'join' a political party merely by asking for the

appropriate ballot at the appropriate time . . . .") (citation and internal quotation marks omitted); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1986) ("[T]he act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.").

Moreover, respondents acknowledge that under Indiana law, a voter participating in a Democratic primary must declare that he supported most of the Democratic candidates in the prior general election or intends to do so in the next one. Resp. Br. 17 (citing Ind. Code § 3-10-1-6). There is no reason to require anything more formal than that. Certainly there can be no doubt that the Democratic petitioners represent real people who are would-be Democratic voters but will have their right to vote burdened by the State's unnecessary voting regulation. Article III requires nothing more.[2]

II. PETITIONERS PROPERLY SOUGHT TO ENJOIN ALL ENFORCEMENT OF A BURDENSOME AND UNJUSTIFIED VOTING REGULATION.

The United States, but not respondents, argues that it was somehow improper to mount a facial

---

[2] Respondents do not even attempt a substantive response to petitioners' argument that they have third-party standing as to Party members, such as those who forget to bring their ID to the polls, who could not have anticipated the problem and sued on their own behalf. *See* Pet'r Br. 59-60. Petitioners have not "hypothesize[d]" an injury. Resp. Br. 18. They properly sued to prevent the kind of injury that the new law inevitably would cause to persons not identifiable in advance.

attack on the Photo ID Law before the first election in which that law was in effect. U.S. *Amicus* Br. 11-18 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The argument seems to be that because the Photo ID Law would not burden everyone's right to vote equally, the Court should deny all relief, even if it agrees there is a subset of voters whose rights are substantially and unnecessarily burdened because they lack IDs. *See id.* at 16-17. This argument has been waived. And in any event, it should be flatly rejected.

To begin with, *Burdick* clearly calls upon courts to assess voting regulations facially. *Burdick* itself was a facial attack on a law that burdened the rights of only a subset of voters. *See* 504 U.S. at 430; *id.* at 447 (Kennedy, J., dissenting) (arguing that the write-in ban should be invalidated because "some voters cannot vote for the candidate of their choice without a write-in option"). By its very nature, the *Burdick* balancing test is not applied on a person-by-person basis to ascertain whether a law violates the rights of a given individual. Rather, the balance is systemic. A court weighs the magnitude and extent of burdens on voting rights against the systemic benefits claimed by the State. And in that balancing, the fact that a burden is not evenly distributed among the voters is a reason for *heightened* constitutional concern rather than a reason to withhold judicial relief.[3]

---

[3] Contrary to the contentions of the United States, U.S. *Amicus* Br. 12 n.3, the *Burdick* facial approach is consistent with First Amendment overbreadth doctrine because there is a real

To be sure, when a court determines that the burdens outweigh the supposed benefits in a given case, it may still make sense to enjoin enforcement of the law only partially rather than completely. That decision depends on whether severance of the burdensome aspects of the law can be done without intruding into the "quintessentially legislative" realm and consistent with legislative intent. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-30 (2006). Here, a limited remedy would require quintessentially legislative line-drawing. A court would have to determine precisely which types of would-be voters are sufficiently burdened to need an exemption from the Photo ID Law and how to identify them when they come to the polls. In addition, it is doubtful that the legislature would have wanted such lines drawn, creating two sets of identification procedures for different categories of voters. For these reasons, under *Burdick* and *Ayotte*, facial invalidation is the appropriate remedy here.

The United States also suggests that *this* facial attack was premature because the law had not yet been applied in an election. But if voters can supply sufficient evidence for a meaningful application of the *Burdick* balancing test, they should not be forced to suffer an irreparable loss of their constitutional rights before challenging an election regulation. *See California Democratic Party v. Jones*, 530 U.S. 567, 578-79 (2000) (striking down blanket primary

---

danger that absent a facial challenge, many voters will be chilled from participating by the burdens imposed on voting.

because even "a single election in which the party nominee is selected by nonparty members" presented "a clear and present danger" to the party).

Here, petitioners presented ample evidence showing how burdensome it would be for some registered voters who lack photo IDs to vote. They supplied expert testimony from a political scientist, along with testimony from fact witnesses, about which groups of voters were most likely to suffer harm. And while their expert statistical testimony estimating the magnitude of the impact was rejected on methodological grounds, it remained clear that at least tens of thousands of Hoosiers would be in the group most affected. The District Court and the Court of Appeals then proceeded to apply the *Burdick* test — incorrectly, in petitioners' view — without evincing any concern about the prematurity of the case.

The United States also wrongly accuses petitioners of trying to buttress a weak case with extra-record citations. U.S. *Amicus* Br. 15. Petitioners, respondents, and *amici* have pointed the Court to publications outside the record that may aid the Court's analysis. But none of that information is essential to the outcome. The record in the District Court established that Indiana had passed a disparately burdensome voting law under highly suspicious circumstances and with only the flimsiest empirical support for the state interest purportedly being served. *See* Pet. App. 11a-15a, 151a-155a. Under *Burdick*, that is enough to justify enjoining the Photo ID Law from taking effect.

III. RESPONDENTS' EFFORTS TO SHOW AN ACTUAL OR POTENTIAL PROBLEM WITH VOTER-IMPERSONATION FRAUD FAIL.

A. The "Evidence" Cited by Respondents Amounts to Little or Nothing.

Respondents try to create the appearance of empirical support for the State's purported concerns about voter-impersonation fraud by citing scattered reports that they know paint a completely false picture. A close examination of the allegedly "frequent" and "credible nationwide reports of voter-impersonation fraud" that respondents cite (Resp. Br. 2-4) reveals no more than a handful of incidents that could even possibly involve voter-impersonation fraud or be addressed by a photo-ID requirement. Moreover, virtually every one of the examples cited by respondents has been debunked by subsequent court decisions, government audits, media analyses, or scholarly studies.

Respondents first note that the U.S. Department of Justice (DOJ) "has launched more than 180 investigations into election fraud" over the past five years, and they assert that "some" of these investigations have "resulted in charges for multiple voting." Resp. Br. 2. But not one conviction detailed in DOJ's report involved in-person voter-impersonation fraud. *See* Pet'r Br. 48; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1 ("Many of those charged by the Justice Department appear to have mistakenly filled out

registration forms or misunderstood eligibility rules.").[4]

Respondents then describe incidents in Georgia, Missouri, Washington, and Wisconsin. But as already discussed in briefs for petitioners and their *amici*, the vast majority of these incidents did not involve voter-impersonation fraud and could not have been prevented by a photo-ID law.

1. *Georgia*: Respondents cite a report in the *Atlanta Journal-Constitution* that 5,412 votes were cast in the names of decedents in Georgia between 1980 and 2000. Resp. Br. 2 (citing State's S.J. Br. Ex. 12, at 1). But any implication that persons were fraudulently voting in the name of deceased voters was discredited by the Georgia Secretary of State's office as early as 2001. Just weeks after the cited news account, the State of Georgia determined that the newspaper's one specific example of a dead voter purportedly voting was false and that the 5,412-vote figure (a 20-year total) could not be attributed to in-person voter fraud. *See* Secretary of State Cathy Cox, *The 2000 Election: A Wake-Up Call for Reform and Change* 11 n.3 (Jan. 2001), *available at* http://sos.georgia.gov/acrobat/elections/2000_election_report.pdf. As the Secretary of State explained, "a subsequent check of the records by Fulton County

---

[4] Nor, of course, should the number of investigations be seen as significant in itself, given that they resulted in large part from a single, department-wide, "high priority" initiative begun in 2002. State Ex. 2, at 2 (DOJ Press Release from 2005) ("More than 120 election fraud investigations are currently pending throughout the country, all but four of which were opened after the initiative began in October 2002.").

staff revealed that the media account was erroneous. . . . What occurred in this purported case of voter fraud was in fact a prime example of the type of input error that can commonly occur — and that underlies the false proposition that thousands of dead Georgians voted in recent elections." *Id.*; *see also* Pls.' Exs. 27 & 28 (documenting data problems in Georgia); Brennan Ctr. *Amicus* Br. 14 n.11; Secretaries of State *Amicus* Br. 10.

2. *Missouri*: Respondents cite "300 Missouri voters" who may have voted twice in the 2000 and 2002 elections and "over 1,000 fraudulent ballots." Resp. Br. 3 (citing State S.J. Br. Ex. 8, at 1; Ex. 6, at 43; Ex. 7, at 3-6). But these reports have been thoroughly discredited. *See* Pet'r Br. 46-47; Secretaries of State *Amicus* Br. 8-9. As the Missouri Supreme Court recently found, since 2002, "the *only* specific instance of possible fraud . . . involved an attempt (whether intentional or accidental is not clear) by a person who had voted absentee to then vote in person." *Weinschenk v. State*, 203 S.W.3d 201, 205 (Mo. 2006) (emphasis added). Indeed, the very exhibit respondents rely on notes that because "[i]nformation for the St. Louis area in the state computer file . . . is especially corrupt, . . . many of the voters listed as having voted in two places in the St. Louis area may actually have voted in only one." State S.J. Br. Ex. 8, at 3.

3. *Washington State*: Respondents allege that in Washington's 2004 gubernatorial election, "the tally included more than 1,600 fraudulently cast ballots, including 19 decedent votes, six double votes, and 77

votes unaccounted for on the registration rolls." Resp. Br. 3 (citing State S.J. Br. Ex. 3, at 4-5, 19). But while respondents cite sensationalistic news accounts that were later discredited, *see* Pet'r Br. 47, the Washington state court that examined the election found absolutely nothing to "suggest fraud or intentional misconduct" in the election. State S.J. Br. Ex. 3, at 2199.

4. *Wisconsin*: Respondents cite an investigation reporting "more than 100 double votes under fake names and addresses" in the 2004 election in Wisconsin, where "ballots cast exceeded registrations by 4,609, nearly 2% of the total votes." Resp. Br. 2-3 (citing State S.J. Br. Ex. 4, at 2, 5). But the State of Wisconsin later acknowledged that the 4,609-vote figure was attributable to bureaucratic error, not in-person voter fraud. *See* State of Wisconsin, Legislative Audit Bureau, VOTER REGISTRATION: AN EVALUATION, REPORT NO. 05-12, at 11 (Sept. 2005), *available at* http://www.legis.wisconsin.gov/lab/reports/05-12Full.pdf; *see also* Brennan Ctr. *Amicus* Br. 20-21 (collecting sources debunking voter-fraud allegations in Wisconsin); LORRAINE MINNITE, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY 5 (2007) ("The problems leading to the federal investigation in Wisconsin . . . were directly attributable to clerical errors, poll worker shortages, and incompetence, not any organized scheme or intent on the part of voters to scam the system.").

Finally, respondents turn to Indiana and discuss the invalidation of the 2003 mayoral primary in East

Chicago and other "convictions for various types of fraud, including voting in the wrong precinct and mishandling absentee ballots" in Indiana. Resp. Br. 3-4. Again, there is no indication that the Photo ID Law would do anything to address any of these issues. Indeed, the fact that respondents have focused on photo ID rather than addressing these more pressing concerns makes their motivations all the more suspect. Thus, even if their contention that these incidents of election fraud in Indiana "evidence a political culture where political bosses resort to fraud to sway elections" were true, *id.* at 4, there is no evidence at all that political bosses (or anyone else in Indiana) are resorting to *voter-impersonation* fraud to sway elections. As discussed in petitioners' opening brief, this would be an extraordinarily inefficient and absurdly risky way to try to affect an election. *See* Pet'r Br. 37, 43-44.

Overall, out of hundreds of millions of votes cast nationwide over the past decades, respondents have cited no more than a handful of incidents that can actually be described as "credible" reports of in-person voter-impersonation fraud. It is abundantly clear that there are, contrary to Judge Posner's surmise, far "fewer impersonations than there are eligible voters whom the new law will prevent from voting." Pet. App. 9a.

B. Respondents Cannot Justify Burdening the Right to Vote by Citing Their Own Failure to Manage the Voter Rolls Properly.

After citing no evidence of voter-impersonation fraud in Indiana — and virtually no evidence of such fraud anywhere else — respondents fall back on the notion that the Indiana legislature could properly act based solely on the anticipation of a problem arising in the future. They point to the State's own poor record of maintaining up-to-date voter records to justify anticipating and preventing an unprecedented wave of voter impersonation — even asserting with a straight face that "[v]oter impersonation is a particularly acute concern in Indiana." Resp. Br. 50. And they suggest that the problem will recur as long as federal law creates the right to register to vote when obtaining a driver's license, while regulating processes for purging the rolls of erroneous or outdated registrations. *Id.* at 5-7, 50-53.

This argument must be rejected. Just as a State's lack of funding for prisons cannot justify violating the Eighth Amendment, and inadequate training for police officers cannot justify violating the Fourth Amendment, the State's failure to do its legally mandated job of managing voter rolls cannot justify burdening citizens' First and Fourteenth Amendment rights to vote. Although managing voter rolls may be difficult, respondents' admission that the prior inflation of Indiana's voter rolls was "among the highest in the nation," *id.* at 7, proves that it is possible to do the job better than Indiana

did. Moreover, although a State has the power to regulate voting to prevent future problems prophylactically, that power is not unlimited. The State's actions must be "reasonable" and must "not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Here, the State's action significantly burdens the constitutionally protected right to vote. And the State's decision to act at this time (when its voter-roll management was most glaringly contrary to federal law) and in this way (by enacting the Photo ID Law) is manifestly unreasonable.

After all, if bloated registration rolls were likely to cause a substantial amount of voter-impersonation fraud, one would have expected the phenomenon to have occurred by now. The National Voter Registration Act (also known as Motor Voter) was passed in 1993, and the State itself reports that the problem of bloated rolls "hit home" in Indiana by 2000. Resp. Br. 6-7. But there is still no known example of voter-impersonation fraud in the State. This is unsurprising because, as the federal Election Assistance Commission reported, regardless of the condition of the voter rolls, in-person voter impersonation remains a bizarre and unworkable way to commit election fraud. *See* Pet'r Br. 47. There simply is no reason to believe that anyone, anywhere, organizes hundreds of people into a conspiracy to try to swing an election by impersonating registered voters at the polls. Any such impersonation would be, by its very nature, the act of an irrational outlier.

For these reasons, the problem of inflated voter rolls in Indiana, already on the way to being resolved following a federal lawsuit, cannot justify the State's decision to impose unrelated burdens on non-drivers' exercise of the franchise.

IV. THE PHOTO ID LAW'S BURDENS ON VOTING FAR OUTWEIGH THE IMPLAUSIBLE JUSTIFICATION OFFERED BY THE STATE.

Respondents' efforts to minimize the burdens on voting rights created by Indiana's Photo ID Law are no more persuasive than their efforts to establish a state interest underlying the law.

A. "Prevention" Is Not the Issue.

Like the courts below, respondents claim it is highly significant that the record contains not a single identified individual who was "prevented" from voting because of the Photo ID Law. Resp. Br. 9; *see id.* at 7, 14, 18, 24. But that claim is wrong for several reasons. First, the record was made before any elections were conducted under the Photo ID Law. So it was not yet possible to point to voters like those described by respondent Marion County Election Board who in fact were ultimately disenfranchised by the new law. *See* Marion County Election Bd. Br. 8-9.

More importantly, the question is not whether the law "prevents" voting by anyone. The question is whether the law *burdens* voting to such a degree that some voters will be deterred from exercising that right. The burden, if not adequately justified by countervailing state interests, is the constitutional

injury. For that reason, it is equally incorrect for respondents to repeat over and over the assertion that petitioners failed to establish that anyone would be "injured" by the law. *See, e.g.*, Resp. Br. 19. Indeed, elsewhere in their brief, respondents concede that nearly "25,000 voters . . . [are] in a position conceivably to suffer a negative impact from the Voter ID Law." *Id.* at 25.

Moreover, petitioners presented ample evidence of the substantial burdens the law imposes on voting rights. That evidence included testimony about the cost and difficulty of obtaining the birth certificates needed to get a license or ID from the BMV. J.A. 10-14. It included specific examples of people who have had difficulty obtaining identification, *id.* at 67, 92-94, as well as testimony that more than half the people seeking IDs at the BMV are turned away because they lack some required document, *id.* at 220-21. It included a survey of registered Indiana voters over the age of 60, showing that 3% of them lacked a valid state-issued ID and that minority and poor senior citizens were particularly likely to lack a driver's license. *Id.* at 32-33. And it included expert testimony from a political scientist demonstrating that raising the difficulty and cost of voting will decrease turnout, especially for low-income and less-educated voters. *Id.* at 99-123, 293-96.

B. Respondents' Analogies to Legitimate Registration Requirements Are Unpersuasive.

Respondents attempt to further minimize the burden of the Photo ID Law by likening that law to

legitimate registration requirements. But the analogy fails.

First, it is not true that this Court has drawn a sharp line between "voter-qualification laws" and mere "procedural" requirements like registration rules. *See* Resp. Br. 22-23. The Court certainly did not do that in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), which upheld a law requiring voters to register their affiliation with a given party some months prior to voting in that party's primary election. To the contrary, the Court analyzed "whether the time limitation imposed by [the law] is so severe as . . . to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise." *Id.* at 760. And in so doing, the Court weighed the degree of the burden, the substantiality of the state interest the law served, and the effectiveness of less onerous alternatives. *Id.* at 760-62. *Rosario* is thus totally consistent with the *Burdick* standard this Court enunciated 19 years later. Both cases require courts to assess the burden created by *every* regulation of the voting process, weighing it against the asserted state interests and taking into account available alternatives. Under that standard, given how weakly supported the claimed state interests are here, the burden imposed by Indiana's Photo ID Law is constitutionally intolerable.

Second, whether or not the burdens of registering to vote exceed the burdens of complying with the Photo ID Law, each such regulation must be assessed on its own, in light of all the relevant

circumstances, taking into account the "the extent to which [the State's] interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434. Here, the State has articulated no legitimate and substantiated interest in preventing voter-impersonation fraud at the polls by requiring photo IDs. The State's interest in having registration laws is quite different and would have to be assessed in an appropriate case.

C. Respondents' Efforts to Minimize the Number of Affected Voters Are Both Erroneous and Irrelevant.

No fewer than seven times, respondents claim that 99% of Indiana adults already possess a state-issued photo ID. *E.g.*, Resp. Br. 8, 12, 25, 27, 28, 43, 55. And they even assert that "[p]etitioners agree with this estimate." *Id.* at 25. That is nonsense. The best evidence suggests that far less than 99% of all Indiana adults have state-issued ID; petitioners have never "agree[d]" with that "estimate"; and in any event, even if it were correct, it would not render the Photo ID Law constitutional.

The 99% figure comes from some back-of-the-envelope calculations the district judge made in the course of rejecting petitioners' expert report. Pet. App. 69a-70a & nn.40-43. Essentially, the judge compared the total number of licenses and IDs issued to voting-age people with the number of voting-age residents reported by the census, adjusted to 2005. *See id.* The resulting estimate cannot bear the weight respondents place on it.

First, respondents ignore the judge's own explanation of why she prefaced her 99% estimate with a key qualifier: "up to 99%." Pet. App. 104a. She readily conceded that she lacked "the resources to evaluate and weigh" all the relevant factors, and therefore she did "not believe [her] simple analysis [was] in any way complete or definitive." *Id.* at 70a n.43. She went on to list various factors that her "simple comparison of raw numbers" ignored and that suggested the percentage of Indiana voters with photo ID "is actually lower than 99%." *Id.* Most significantly, the count of driver's licenses and IDs included those issued to people who had subsequently died or left the State. *See id.* But those same people would have been excluded from the census count, thus inflating the apparent percentage of the population with identification. *See id.* The list of factors "not take[n] into account," *id.*, is why the district judge characterized her own estimate as *not* "a serious analysis of [the Photo ID Law's] impact on Indiana voters." *Id.* And it also is why petitioners, citing this very passage from the District Court's opinion, referred to the 99% estimate (in what admittedly was an understatement) as "conservative[]." Pet'r Br. 17-18 (citing Pet. App. 69a-70a & nn.40-43).

Furthermore, the best available evidence suggests that respondents are off by an order of magnitude when they assert that only 1% of Indiana adults lack government-issued photo ID. Resp. Br. 13; *see also* U.S. *Amicus* Br. 9 (asserting that "less than 1% of Indiana voters . . . do not yet have [photo] ID"). The correct figure is almost certainly above 4%

and quite possibly in excess of 10%. After analyzing data from the Federal Highway Administration and the Census Bureau, the Carter-Baker Commission on Federal Election Reform estimated that 12% of voting-age Americans lack a driver's license. *See* Comm'n on Fed. Election Reform, BUILDING CONFIDENCE IN U.S. ELECTIONS 73 n.22 (2005). A nationwide survey by the independent Opinion Research Corporation showed that 11% of voting-age United States citizens lack *any* form of current government-issued photo ID, including driver's licenses, state-issued ID cards, and passports. *See* Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 1, 3 (Nov. 2006).

The Michigan Supreme Court found that 5% of registered Michigan voters lack both a driver's license and a state identification card. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 456 n.50 (Mich. 2007). Based on official state records, a federal court found that between 4% and 5% of Georgia's registered voters have a driver's license that has been "canceled, revoked, suspended, or declared invalid," and an additional 2% to 3% lack any driver's license. *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1361 (N.D. Ga. 2007). And according to the Missouri Secretary of State, between 4% and 6% of registered voters lack the type of photo identification required by the Missouri law that the state supreme court ultimately struck down. *See* Secretaries of State *Amicus* Br. 11.

Thus, if only 1% of Indiana adults lack government-issued photo ID, Indiana deviates dramatically from the three States with solid official data (Michigan, Georgia, and Missouri) and falls far outside the national mainstream.[5] But even if that were the case, the 1% figure still amounts to 43,000 people who are eligible to vote but lack the requisite identification. *See* Resp. Br. 25-26; Pet. App. 69a. That is a sizeable bloc of voters, especially in a State where the balance of power in the legislature turns on just a handful of seats. *See* Pet'r Br. 19.

Ultimately, the constitutionality of this law cannot turn on whether the correct number of affected persons is 43,000, or 430,000, or somewhere in between. Given the weakness of the State's purported justifications, the Photo ID Law's burdensome effects on "some individual voters,"

---

[5] The only recent study focusing exclusively on Indiana, so far as petitioners are aware, suggests that Indiana's ID-less population is, if anything, *larger* than in those other States. In October 2007, three political scientists conducted a statewide survey using a registered-voter list cross-checked with the respondent Indiana Secretary of State. *See* Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 7 (Nov. 8, 2007), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf. The survey showed that 13% of Indiana registered voters do not have a current Indiana driver's license, state photo-ID card, U.S. passport, military photo ID, or Indiana public-university photo-ID card. *Id.* at 8, 18. Because the survey had a large sample size, the margin of error was only 3.1%, *id.* at 8, making it unlikely that the actual percentage of Indiana registered voters lacking compliant ID falls much below 10% — fully ten times the figure on which respondents so heavily rely.

Burdick, 504 U.S. at 448 (Kennedy, J., dissenting), are constitutionally intolerable.

Where the District Court's estimate is potentially more relevant is in assessing whether the Photo ID Law's restrictions on voting rights are "'nondiscriminatory.'" *Burdick*, 504 U.S. at 434 (citation omitted). The District Court noted that if the 1% figure is correct, ID-less residents are "substantially concentrated in Marion County." Pet. App. 69a; *see* Pet'r Br. 18. A Marion County adult would be 16 times as likely as an adult elsewhere in Indiana to lack state-issued photo ID. Pet'r Br. 18. As discussed further *infra*, that disparity would be significant because Marion County is "the State's most heavily urbanized county [and] a Democratic stronghold," "one of only four Indiana counties (out of 92 total) that voted for Senator Kerry over President Bush" in the 2004 presidential election. *Id.* at 18-19.

A burden distributed this unevenly requires especially close scrutiny under the *Burdick* test. It is no response to say that petitioners did not prove discriminatory intent. *See* Resp. Br. 30-31, 35-36. Intent is not an element under *Burdick*, but disparities in the distribution of the burdens on voting rights call for careful scrutiny of the state interests being served.

D. The Evidence Confirms the Commonsense Conclusion that Those Most Affected by the Photo ID Law Tend to Be the Less Affluent.

The Seventh Circuit thought there was "[n]o doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates." Pet. App. 3a. In respondents' own publication on the photo-ID "public education initiative," they admitted that the poor will be especially affected. *See* State Ex. 46 at Ex. A. And that insight has been confirmed by a research study co-authored by the State's own expert witness. *See* R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout*, VTP Working Paper #57, Version 2 (Oct. 2007), *available at* http://vote.caltech.edu/media/documents/wps/vtp_wp57b.pdf [hereinafter Alvarez/Katz Study]; J.A. 265.

This comports with common sense. An Indiana driver's license costs $19.50, and the main reason to pay that fee is to drive a car, which, of course, costs considerably more money. So it is hardly surprising that people without driver's licenses tend to have relatively little money. And even though the Indiana BMV will issue a free ID that does not grant driving privileges, that does not solve the problem because the documentation required to obtain such an ID also costs money and can be very difficult to obtain. As political science professor Marjorie Hershey testified in the District Court, these kinds of costs and

burdens may not seem significant to some people, but when the costs and burdens of voting are increased, turnout drops, particularly among the poorest and least-educated members of our society. J.A. 104-19. And it certainly is no answer to say that indigents (a category undefined in Indiana law) can sign an affidavit and vote provisionally and then travel to the county clerk's office to sign a second affidavit within ten days attesting to their (undefined) indigency. That burdensome process seems designed to assure it will not be used.[6]

Respondents, unwilling to defend Indiana's Photo ID Law while acknowledging its inevitable disparate effects, attempt to cloud the picture. But their suggestion that the real victims here are affluent white Republicans is as unpersuasive as it is irrelevant.

Take, for example, this passage from the brief filed on behalf of the United States:

> [T]he most recent studies . . . *undermine* petitioners' assertion of disparate impact. The Cal. Tech./M.I.T. study petitioners cite as evidence of the statute's burden (Dem. Br. 34), actually states that "there does not seem to be a discriminatory impact of the requirements for some subgroups, such as nonwhite registered voters."

---

[6] The United States raises the possibility of indigents voting at the county clerk's office prior to Election Day. U.S. *Amicus* Br. 15. Even if that is a possibility, it once again is an option unlikely to be utilized. For many indigent voters, it would require a long trip to the county seat. J.A. 200-01.

U.S. *Amicus* Br. 22 (quoting Alvarez/Katz Study, *supra*, at 21) (emphasis in original). But the very next sentence of the study co-authored by respondents' expert, which the brief omits, states: "However, we do find that for registered voters with lower levels of educational attainment or lower income, stricter voter identification requirements do lead to lower turnout." Alvarez/Katz Study, *supra*, at 21-22.[7]

The argument that there is no disparate effect on low-income voters (or Democrats) is based on an unpublished study by Professor Jeffrey Milyo, which was posted on the Web right after petitioners filed their main brief. *See* Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis* (Nov. 2007). But that study is severely flawed.

To begin with, Milyo relies on a county-by-county comparison of turnout rates from 2002 to 2006, assuming that any changes in voting behavior were entirely attributable to the new Photo ID Law. But of course there were many other reasons why turnout might have changed from 2002 to 2006. For

---

[7] Respondents assert that the Alvarez/Katz Study "identified *no* decline in low-income voter turnout in States requiring photo identification compared with States using *signature-match* requirements." Resp. Br. 40 (citing Alvarez/Katz Study, *supra*, at 19, 22). But the cited pages make no such statement, and figure 9 on page 22 flatly contradicts this assertion. It shows a significant difference in the probability of voting at the lowest income levels, when comparing signature-match States with photo-ID-required States. Alvarez/Katz Study, *supra*, at 22 fig. 9.

example, in 2006, there were several high-profile congressional elections in Indiana in which Democratic challengers beat Republican incumbents. *See* CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS 368, 379-81, 1171 (2007). Massive amounts of money flowed in from all over the country to turn out the Democratic vote. *See id.* Moreover, 2006 in general was a much more Democratic year than 2002. *See* Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 POL. SCI. Q. 1 (2007). Yet all the effects of these changed circumstances are treated by Milyo as effects of the Photo ID Law.

Moreover, Milyo's study is tainted by what social scientists call the "ecological fallacy" (or "aggregation bias") — trying to infer conclusions about individual behavior (which types of people turned out to vote) from aggregate data (the turnout percentages and demographics of each of Indiana's 92 *counties*). *See* J.A. 275-76. A similarly flawed study might conclude that most African-Americans vote Republican because the States with the highest percentage of African-Americans — those in the Deep South — voted Republican in recent presidential elections. Given these and other problems with the Milyo study,[8] nothing he says is remotely meaningful.

---

[8] Milyo also commits the elementary error of running a variable for every possible category of age and education (*see* Milyo, *supra*, at 14), which has the effect of rendering the results statistical gibberish. *See* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 197 (2d ed. 2000) (explaining that multiple regression breaks down "[w]hen two or more explanatory variables are correlated perfectly," also

Emblematic of how far respondents will go to obscure the Photo ID Law's discriminatory impact is their suggestion that the law would be supported by President Carter and former Secretary of State Baker. Resp. Br. 5, 13, 29; *see also* U.S. *Amicus* Br. 28 n.5. But in fact, both President Carter and Secretary Baker condemned the similar Georgia statute as "discriminatory" and endorsed photo-ID requirements *only* on the condition that States first assure that all adult citizens have been provided such identification. *See* Pls.' Ex. 18 (Jimmy Carter & James A. Baker, *Voting Reform Is in the Cards*, N.Y. TIMES, Sept. 23, 2005, at A19).

Of course, when it enacted the Photo ID Law, the State of Indiana gave no such assurance. Indeed, the great irony of this case is that if all Hoosiers had photo IDs, there probably would be no Photo ID Law. Given the strong reason to suspect that the legislature abused its power by choosing to attack a non-problem in a way that would have a foreseeable partisan impact on voter turnout, allowing the Photo ID Law to stay in effect would only erode public confidence in the integrity of our electoral system.

---

known as "perfect collinearity"); *cf. Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001) (Posner, J.) (discussing collinearity and warning of "the risk that the party's statistical witness ran 20 regressions, one and only one of which supported the party's position").

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

WILLIAM R. GROTH
GEOFFREY S. LOHMAN
FILLENWARTH DENNERLINE GROTH & TOWE
1213 N. Arlington Avenue
Suite 204
Indianapolis, IN 46219
(317) 353-9363

JOSEPH E. SANDLER
SANDLER REIFF & YOUNG PC
50 E Street, SE, # 300
Washington, DC 20003
(202) 479-1111

December 20, 2007

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
JESSICA RING AMUNSON
CARRIE F. APFEL
SHARMILA SOHONI
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

LUKE P. MCLOUGHLIN
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York NY 10022
(212) 891-1651